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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**SELINA RENE WINN,**

**Defendant and Appellant.**

**A125435**

**(Contra Costa County  
Super. Ct. No. 05-081534-0)**

Defendant Selena Rene Winn (appellant) appeals the sentence imposed after she pled no contest to possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)) (count 3) pursuant to a negotiated disposition.<sup>1</sup> Appellant contends she is entitled to additional presentence custody credits under Penal Code section 4019 (as amended by Stats. 2009-2010 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010). We agree with appellant that the amendment is retroactive and she is thus entitled to recalculation of her presentence custody credits.

### BACKGROUND

In March 2009, appellant was charged with possessing cocaine base for sale with a prior drug conviction (count 1), and possession of cocaine salt (count 2) (Health & Saf.

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<sup>1</sup> Pursuant to the negotiated disposition, a charge of possession of cocaine base for sale with a prior drug conviction (Health & Saf. Code, §§ 11351.5, 11370.2, subd. (a); Pen. Code, § 1203.07, subd. (a)(11)) (count 1) was dismissed.

Code, § 11350, subd. (a)). A prior prison term and probation ineligibility were also alleged. In May, a jury found appellant guilty of count 2 but were unable to reach a verdict on count 1. The court found true the probation ineligibility and prior prison term allegations. It imposed a two-year midterm on count 2 and awarded appellant 399 days of presentence credit.

In June 2009, on the day set for the retrial on count 1, at the request of the prosecution, the court amended the information to add count 3. Pursuant to a negotiated disposition, appellant pled no contest to count 3 and count 1 was dismissed. The court imposed an eight-month term to run consecutively to the two-year term imposed on count 2. The court awarded appellant 417 days of presentence credits, consisting of 279 actual days and 138 conduct credits.

## DISCUSSION

Appellant contends that pursuant to a retroactive application of the recent amendment to Penal Code section 4019<sup>2</sup> she is entitled to an additional 140 days of presentence credit.

A criminal defendant is entitled to credit against his or her term of imprisonment for all days he or she spends in custody, “including days credited to the period of confinement pursuant to Section 4019.” (§ 2900.5, subd. (a).) A criminal defendant may earn additional presentence credit against his or her sentence for a willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (d)). Collectively, these forms of presentence credit are called conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Under former section 4019 (Stats. 1982, ch. 1234, § 7, p. 4553), in effect when appellant was sentenced, conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. Effective January 25, 2010, the Legislature amended section 4019 to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction

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<sup>2</sup> All further undesignated section references are to the Penal Code.

of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, may accrue conduct credit at the rate of two days for every two days of presentence custody (§ 4019, subds. (a)(4), (b)(1) & (2), (f)). If sentenced under the current version of section 4019, appellant would be entitled to an additional 140 days of conduct credit. The determinative question is whether the amendment to section 4019 applies retroactively to qualified prisoners, such as appellant, whose judgments of conviction were not final at the time the amendment went into effect.

The issue of whether the recent amendment to section 4019 applies retroactively or prospectively has been addressed in numerous published opinions. Those cases express a split of opinion on the issue. The Fourth District (Div. Two), the Fifth District, and the Sixth District have held that the amendment does not apply retroactively. (*People v. Hopkins* (May 11, 2010, H033413, H034048) \_\_\_ Cal.App.4th \_\_\_ [2010 Cal.App. LEXIS 657]; *People v. Otubuah* (Apr. 7, 2010, E047271) \_\_\_ Cal.App.4th \_\_\_ [2010 Cal.App. LEXIS 622]; *People v. Rodriguez* (2010) 183 Cal.App.4th 1.) The First District (Divs. Two, Three and Five), the Second District (Divs. One and Six), and the Third District have held that the amendment is retroactive. (*People v. Pelayo* (May 6, 2010, A123042) \_\_\_ Cal.App.4th \_\_\_ [2010 Cal.App. LEXIS 627]; *People v. Norton* (May 5, 2010, A123659) \_\_\_ Cal.App.4th \_\_\_ [2010 Cal.App. LEXIS 612]; *People v. Delgado* (2010) 184 Cal.App.4th 271; *People v. Landon* (2010) 183 Cal.App.4th 1096; *People v. House* (2010) 183 Cal.App.4th 1049; *People v. Brown* (2010) 182 Cal.App.4th 1354.)

As this division held in *People v. Pelayo*, we agree with those courts that have determined the recent amendment to section 4019 applies retroactively, and respectfully disagree with those courts that have reached a contrary conclusion. The record before us demonstrates that appellant is not excluded from the amendment. Consequently, she is entitled to a recalculation of her presentence custody credits.

#### DISPOSITION

The judgment is reversed solely for recalculation of appellant's presentence custody credits. On remand, the trial court shall revise its sentencing order and the

abstract of judgment to reflect that appellant earned 279 actual credits and 278 conduct credits (§ 4019) for a total of 557 presentence credits. The court is directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.